The Indiana Prosecutor

March 2006

RAISES FOR PROSECUTORS

Good news is on the horizon. The Governor's Office has disclosed that Elected Prosecutors will receive a 2% pay increase effective July 1, 2006. This is consistent with the State Employee pay raise which was granted during the 2005 legislative session. Governor Daniels announced a policy that all future increases would be based on merit. This lead to some confusion as to how merit increases would be applied to elected officials. The issue has not been resolved. Future raises for judges and prosecutors will be determined by the Budget Director and shall be based on the average increase given to agency heads. ❖

2% pay increase effective July 1, 2006

BMV CHANGES MAY DISCOVER IDENTITY THIEFS

Dave Certo, Indiana Bureau of Motor Vehicles Chief Counsel, attended the last Prosecutor's Council Board Meeting to announce two upcoming changes in the BMV record system. Later this Summer, BMV will be expanding their computer system to allow Prosecutors to print certified BMV records for titles and registrations in addition to certified driving records. The system also has the capability of printing license photos which is already in use in some counties.

The second update to take effect this Summer, is a combined database. Currently BMV has a separate database for driver's licenses, automobile registrations and title registrations. BMV will be combining all three databases into one. They expect to find multiple overlaps where one social security number comes back to multiple users. They are actually estimating about 30,000 records may contain this error. Dave wanted to give Prosecutors advance warning that *some* of these cases may be coming their way. With such a large number BMV will not be reporting every overlap. But in those cases where there appears to be an obvious problem, they will contact law enforcement. Dave stressed that they will not be actively searching the database for multiple users of a social security number. It is not designed as a search tool. This appears to be just a bonus.

Dave also told the group that BMV will be happy to help clear up driving records of person whose reports contain offenses legitimately committed by an identity thief. If someone is mistakenly assigned a traffic offense because their driver's license was used by someone else, contact Dave at (317) 232-2915 or email at dcerto@bmv.in.gov. ❖

Inside this Issue

U.S. Supreme Court Decisions

- **VALITITY OF ONE OCCUPANT'S CONSENT TO SEARCH RESIDENCE WHEN CO-OCCUPANT OBJECTS**

Georgia v. Randolph, ___ U.S. ___, ___ S.Ct. ___ (3/22/06).
http://www.supremecourtus.gov/opinions/05pdf/04-1067.pdf

The facts of *Georgia v. Randolph* are relatively uncomplicated. The implications of this 5-3 decision (Alito, J., not participating) are not.

Janet and Scott Randolph separated in May 2001. Janet left the marital residence in Americus, Georgia and went to stay with her parents in Canada. She took her son and some belongings. In July she returned to the house in Americus with her child. On the morning of July 6, she called police to the house and told them that Scott took their son after a domestic dispute. She also said that her husband was a cocaine user. She did tell the police of their marital problems and that she had just returned to Americus. Shortly thereafter Scott returned and explained that he had removed the child to a neighbor's house out of concern that his wife might take the child out of the country again. He denied cocaine use and said his wife abused drugs and alcohol.

One of the officers went with Janet to reclaim the child. She renewed her complaints about Scott's drug use and volunteered there were "items of drug evidence in the house." An officer asked Scott for consent to search the house and he unequivocally refused. The officer then asked Janet for consent to search, which she readily gave. She led officers upstairs to a bedroom she identified as Scott's and a drinking straw with a powdery residue that appeared to be cocaine was observed. The district attorney's office advised the officers to stop the search and apply for a warrant. Janet then withdrew her consent to search. The straw was seized and the Randolphs were taken to the police station. A subsequent search pursuant to a warrant uncovered other evidence of drug use and Scott was charged with possession of cocaine.

In a nutshell here is the issue that was before the Supreme Court: Two co-occupants of a residence are at the threshold of a residence. One occupant consents to a search and the other refuses. Can the police conduct a warrantless search based on the consent of one occupant? The majority opinion declared: "We . . . hold that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." As the dissent pointed out in great detail, this holding raises many questions.

"We . . . hold that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present residence cannot be justified as reasonable as to him on the basis of consent given to the police by another resident."

The holding itself says that the search is unreasonable only as to the non-consenting occupant. Evidence seized could not therefore be admitted against the non-consenting occupant. What about another occupant that was not at the doorway and who neither consented nor objected to the search? The majority simply said in a footnote. "We decide the case before us, not a different one."

What happens if there is another occupant or occupants of the residence who are not at the front door when police come? Must police seek out that individual or individuals to determine whether they will also consent? The majority opinion said: "This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it. . . . [W]e think it would needlessly limit the capacity of police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received." This was mocked by the dissent of Chief Justice Roberts who said the majority's rule did not protect privacy "as much as the good luck of the co-owner who just happens to be present at the door when the police arrive."

What about domestic violence situations where the battered person calls the police and invites them to enter

(continued on page 3)

but the batterer denies entry? On this issue the majority said: "Fear for the safety of the occupant issuing the invitation, or of someone else inside, would be thought to justify entry, but the justification then would be the personal risk, the threats to life or limb, not the disputed invitation." Later the majority in a footnote states: "Sometimes, of course, the very exchange of information like this in front of the objecting inhabitant may render consent irrelevant by creating an exigency that justifies immediate action on the police's part." The Court then cites a case which authorizes denying an occupant access to his residence while a warrant is obtained. It also listed other exigent circumstances such as "hot pursuit," "protecting the safety of police officers," imminent destruction to the building, and the likelihood that the suspect will imminently flee as other possible exigent circumstances.

The jousting between the majority, concurring and dissenting opinions make a very interesting read.

For Indiana cases in this area *See Primus v. State*, 813 N.E.2d 370 (Ind. Ct. App. 2004); *Hill v. State*, 825 N.E.2d 432 (Ind. Ct. App. 2005). ❖

- **ANTICIPATORY SEARCH WARRANTS**

United States v. Grubbs, 547 U.S. ___ (2006).

http://www.supremecourtus.gov/opinions/05pdf/04-1414.pdf

In March, the U.S. Supreme Court decided *United States v. Grubbs*, 2006 U.S. Lexis 2496, finding that anticipatory warrants were not categorically unconstitutional.

Jeffrey Grubbs, a California resident, ordered a videotape depicting Child Pornography from an undercover U.S. Postal Inspection Service web site. A postal inspector sought an anticipatory search warrant from the Magistrate Judge for the Eastern District of California. The inspector presented a search warrant application, two attachments describing the residence to be searched and the items to be seized, and an affidavit describing how and when the warrant would be served. The attachments were made a part of the warrant, but the affidavit describing the "triggering conditions", the details of when and how the warrant would be served, remained separate.

The affidavit stated in relevant part:

"Execution of this search warrant will not occur unless and until the parcel has been received by a person(s) and has been physically taken into the residence....At that time, and not before, this search warrant will be executed by me and other United States Postal inspectors, with appropriate assistance from other law enforcement officers in accordance with this warrant's command."

The affidavit also incorporated the two attachments stating as follows:

"Based upon the foregoing facts, I respectfully submit there exists probable cause to believe that the items set forth in Attachment B to this affidavit and the search warrant, will be found [at Grubbs' residence], which residence is further described at Attachment A."

Several days after the warrant was issued, the package was delivered to Grubb's residence. His wife signed for the tape and then took it inside. Grubbs left his house a few minutes later and was detained. After 30 minutes Grubbs was given a copy of the warrant with the attachments outlining the residence and items to be seized. The inspector did not give him a copy of the affidavit which included the triggering condition. He subsequently admitted to ordering the tape.

Defense Counsel moved to suppress the video tape and other items based on a Fourth Amendment argument that "no Warrants shall issue, but upon probable cause." They argued that because the warrant failed to list the triggering condition in the body of the warrant which was provided to the defendant, it was invalid. The Ninth Circuit Court of Appeals found that failure to include the triggering condition in the warrant did invalidate the warrant, but that defect could have been cured by giving Grubbs the affidavit.

The Supreme Court did not agree with this argument. First the Court addressed the question of whether anticipatory search warrants in general were unconstitutional. Anticipatory warrants require a precedent condition to occur before there is probable cause to believe that items of criminal activity will be obtained during a search. Without this precedent or triggering condition the government would not have probable cause to search. The defense argued that because the triggering condition was not present at the time the warrant was issued, there was no probable cause at the time the warrant was issued. Therefore, since under the Fourth Amendment a warrant could only be issued upon probable cause, and that the probable cause hadn't yet occurred because the triggering condition hadn't occurred, the warrant was invalid.

(continued on page 4)

U.S. Supreme Court Decisions (continued)

Justice Scalia, writing for the Court, stated "We reject this view..... Probable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place. Because the probable cause requirement looks to whether evidence will be found *when the search is conducted*, all warrants are, in a sense, 'anticipatory.' " Whether the sought evidence is present at the time a warrant is issued is immaterial. The requirement to be met is whether there is probable cause to believe the evidence will be present at the time the search is conducted.

For an anticipatory warrant to comply with the Fourth Amendment, a Judge must find that two prerequisites of probability exist. First, there must be a fair probability that evidence will be present when the triggering condition occurs and second, there is probable cause to believe the triggering condition will occur. Both prerequisites must be provided in a supporting affidavit and provided to the Judge. The Court found that the affidavit specifying delivery of the video tape to Grubbs house as a triggering condition, was sufficient to establish probable cause.

For an anticipatory warrant to comply with the Fourth Amendment,

Defense's additional argument, that the warrant itself must contain the triggering condition, also failed. Justice Scalia noted that the Fourth Amendment requires only two matters to be stated with particularity in a warrant "the place to be searched" and "the persons or things to be seized." The Court found that the Fourth Amendment does not require the conditions precedent to the execution of a warrant be included in the body of the warrant.

How will this decision affect anticipatory warrant use in Indiana? We turn to a discussion of the three most recent Indiana cases on anticipatory warrants.

How will this decision affect anticipatory warrant use in Indiana?

The oldest case is *Newby v. State of Indiana* 701 N.E.2d 593 (Ind. App. 1998). Newby's claim was based on the Fourth Amendment to the U.S. Constitution and IC 35-33-5-2(b). He did not assert a claim under the Indiana Constitution.

In this drug case, the Indiana State Police relied on a first time informant to complete a buy from the defendant Gary Newby. The informant, Steve Calloway, had been recruited the night before the search after cocaine was found in his vehicle. He was asked to give up his supplier. Finding it in his best interest, he told police he had received the cocaine from Newby and had to take Newby $3,000 the following day to complete the transaction. In addition , while he was there, he intended to purchase five pounds of marijuana that Newby had at the house.

An anticipatory warrant was obtained based on the information given by the informant with minor corroboration of the exterior of the defendant's residence where the buy was made. While reviewing the warrant the Judge told police that the warrant couldn't be served until the buy money was taken into the house. This warning was given verbally by the Judge but was never placed in writing. The probable cause affidavit included that the money would be delivered to the house but did not specify action based on that trigger. Calloway delivered the money but did not leave the house with any marijuana. Officers then initiated the search and discovered large amounts of contraband. The defendant's motion to suppress the evidence was denied and the case was taken up on an interlocutory appeal.

Judge Najam, writing for the Court, noted that this seemed to be an issue of first impression in the State and that both parties requested a determination of the validity of anticipatory search warrants. Without a specific analysis he wrote, "While a warrant may contain conditions precedent which must occur prior to its execution, a magistrate may not issue a warrant that is not supported by probable cause when it is issued. Stated differently, absent probable cause at the time the warrant is issued, the occurrence or nonoccurrence of any conditions precedent is irrelevant. If execution of the warrant is made subject to conditions precedent, those conditions should appear within the four corners of the warrant. In any event, a *warrant that relies on the occurrence of a future event* to supply the requisite probable cause is *deficient* on it's face." (italics added for emphasis)

The Court then reviewed the facts presented in the affidavit and determined that probable cause did not exist at the time the warrant was issued. Since Calloway gave information only after he had been caught, he had a motive to implicate someone else to shift the attention from himself. The only corroboration of Calloway's information came from viewing the out-

(continued on page 5)

side of Newby's house. Since this was something any member of the public could see and did not link Newby to any criminal activity, the Court found that there was insufficient corroboration of Calloway's information to establish credibility. Therefore, the warrant which relied on Calloway's uncorroborated hearsay did not contain probable cause and was not valid. Further they found that the police could not rely on the Good Faith exception because in Judge Najam's opinion the police had mislead the Judge who issued the warrant. The "motherlode of contraband from Newby's residence" was found to be inadmissible. Judge Najam mused, "unfortunately , the evidence was seized pursuant to an unlawful warrant and is inadmissible. That is the price we must pay to assure that millions of law abiding Indiana residents remain secure from unreasonable searches and seizures."

In 2000 the Court of Appeals took another look at anticipatory warrants in *Marchetti v. State* 725 N.E. 2d 934 (Ind. App. 2000). This case was more favorable to the State than *Newby*.

On June 18, 1997 a package was detained by the United States Postal Service in Indianapolis. A Federal search warrant was served on the parcel and heroin was discovered inside. Inspector Steven Sadowitz contacted Brian Graban of the Indianapolis Police Department with the information. Sadowitz and Graban had worked together previously on numerous occasions. Graban prepared a probable cause affidavit indicating his knowledge of Inspector Sadowitz's ability to be truthful and accurate. He further alleged that Sadowitz knew heroin through his training and experience as a law enforcement officer. The affidavit contained information on the seizure of the drugs, the fact that a Federal Warrant had been attained, that the heroin had field tested positive, who the parcel was addressed to, where it was to be delivered , and where it was noted to be from. Officer Graban then included that a controlled delivery of the parcel would be made at the specified address within the next seventy-two (72) hours by a United States Postal Inspector. In the affidavit he requested an anticipatory search warrant to be issued for the residence in anticipation that within the next 72 hours someone at the house would accept delivery and sign for the parcel. The Affidavit specified that the package would contain a transmitter which would assist officers in monitoring the package and would let officers know when the package was opened or if it was removed from the house. The specific items to be searched for, their relationship to drug trafficking, detailed information about the house, and the places to be searched was included in the affidavit. The last lines indicated that the warrant would become effective when the package was delivered and it was determined that someone had opened the parcel or had attempted to remove the package from the residence.

Judge Friedlander writing for the Court found that the reasonable inference drawn from the totality of the circumstances indicated that probable cause existed at the time of the warrant and therefore the warrant was valid. Then in dicta he began to discuss the *Newby* opinion.

"We acknowledge that there is some language in *Newby (*citation omitted*)* that could support an argument that anticipatory search warrants are invalid in Indiana pursuant to IC 35-33-5-2(a)(2)(A). Nonetheless, other language in the Newby opinion makes clear that, where there is probable cause to search at the time a search warrant is issued, anticipatory search warrants do not violate either Article 1, 11 of the Indiana Constitution or IC 35-33-5-2 Regardless of the language used in Newby, because the Newby court ultimately declined to address the anticipatory search warrant case presented by the parties, *any portion of the Newby opinion that could be used to support an argument that anticipatory search warrants are invalid in Indiana is mere dictum.*" (Italics added)

Finally in 2002 the Court of Appeals addressed *Rios v. State* 762 N.E. 2d 153 (Ind. App. 2002). The facts in this case were similar to *Marchetti.* Joe Brannon , an off duty police officer, was working in a private shipping company when he noticed a suspicious package addressed to the defendant Rene Rios. His attention was drawn by the fact that the package had been shipped next day air, had a handwritten label, was paid for in cash, smelled like dryer sheets, and came from a source area for drugs. (The Court notes that had the officer drawn a correlation between these facts and why they were significant to the drug trade, this warrant would have been stronger.) The officer called for a drug detection dog who was lead past three parcels including the one addressed to Rios. She alerted to the Rios package. Brannon obtained a search warrant based on the above information to open the package. Inside he found what appeared to be cocaine. The officer then sought an anticipatory search warrant for the Rios residence and the person who accepted delivery of the package. The warrant was granted.

The officer called for a drug detection dog who was lead past three parcels including the one addressed to Rios. She alerted to the Rios package.

(continued on page 6)

U.S. Supreme Court Decisions (continued)

Rios first argued that the warrant to open the package was defective. He claimed that the meager facts presented by Officer Brannon did not provide reasonable suspicion sufficient to seize the package nor the more difficult level of probable cause to search the package. The Court noted that there was no level of suspicion required to have a dog sniff a package. Once a dog trained to detect drugs alerted to a package, there was sufficient probable cause for a warrant. Judge Barnes, writing the opinion for the court, discussed seizure in the context of a law enforcement investigation of mail. Based on a Federal Court case they found that a law enforcement officer can briefly detain a package for further investigation without constituting as seizure. The defining question is how long the package is held. If there is no substantial delay in delivering the package then it does not constitute a seizure. Here Brannon had the package approximately an hour and a half before the canine sniff occurred. Therefore, the court found that this was not a seizure.

Another argument made by Rios was that the warrant was deficient because it relied heavily on boilerplate language. The Court found sufficient facts specific to the case to support the warrant. Judge Barnes noted that there was no requirement that law enforcement officers retype every warrant. It is not a problem to use boiler plate language as long as sufficient facts specific to the search are included.

Lastly, Rios challenged the anticipatory warrant based on Article I, section 11 of the Indiana Constitution. This claim is really a restatement of his earlier arguments. Rios' position is that the search warrant executed at the private postal service was defective. Therefore, the cocaine that was found due to that search could not serve as a basis for probable cause for the anticipatory warrant. The Court rejected this claim based on their decision that there was probable cause for the initial warrant.

What is important about this case is that it relies on and ties in the *Marchetti* decision. The court restated the premise of *Marchetti*, anticipatory search warrants are valid under Indiana Code 35-33-5-2 and under the Indiana Constitution.

To summarize, *Newby* was based on an analysis of the Fourth Amendment to the United States Constitution. The United States Supreme Court in *Grubbs* has now clarified the position that anticipatory warrants are allowable under the Fourth Amendment in contradiction to the *Newby* decision. When a Fourth Amendment challenge is made, the determining factors will be 1.) whether there is a fair probability that the evidence will be present when the triggering condition occurs and 2.) is there probable cause to believe the triggering condition will occur. If both factors are met then the warrant should stand.

Marchetti and *Rios* were both argued under the Indiana Constitution and Indiana Code 35-33-5-2. Those courts found that anticipatory warrants were allowable under Indiana law. They both also differentiated themselves from *Newby* factually by focusing on the level of credibility their informants possessed. If anything is left to be cited from *Newby* it is that the credibility of an informant must be established. The reliability of hearsay can be established by including (1) the informant has given correct information in the past, (2) independent police investigation corroborates the informant's statements, (3) some basis for the informant's knowledge is demonstrated, or (4) the informant predicts conduct or activities by the suspect that are not ordinarily easily predicted. *Jaggers v. State*, 687 N.E.2d at 182.❖

Announces that National Crime Victim's Rights Week is April 23-29, 2006.

For more information, visit their website at: http://www.ojp.usdoj.gov/ovc/welcome.html

Recent Decisions Update

Indiana

In February the Indiana Supreme Court decided two cases involving investigatory stops.

In *Kellems v. State* police officers stopped a car based on a tip from an *identified* person. The second case, *Sellmer v. State*, involved a stop based on information from an *anonymous* source. While Kellems was affirmed on appeal, Sellmer was not.

Kellems v. State, 842 N.E.2d 352 (Ind. 2006).
http://www.in.gov/judiciary/opinions/pdf/02160602fsj.pdf

On March 20, 2002 Dodie McDonald called the Tell City Police Department to report Luke Kellems was driving a white pickup truck from Troy to Tell City. She gave a description of the vehicle, the license plate number, that there were children in the car and that Luke Kellems was driving without a license, without insurance and was intoxicated. Sergeant Wooldridge, Tell City Police, spotted truck. He confirmed the license plate number matched the one given by McDonald. The officer then pulled Kellems over without observing any traffic violations.

On approaching the vehicle, Sergeant Wooldridge noticed Kellems' wife and child seated in the passenger seats. Kellems produced an identification card. A check through the Bureau of Motor Vehicles indicated Kellems license was suspended and he was a habitual traffic offender. Kellems was administered a portable Breathalyzer test which indicated a negative result for alcohol. Wooldridge arrested Kellems for operating a vehicle while a habitual offender. Kellems filed a motion to suppress the stop which was denied.

The question raised on appeal was whether a tip provided by a name individual was sufficient to provide the police with reasonable suspicion to perform an investigatory stop of a vehicle. Our Court accepts the U.S. Supreme Court's premise in *Alabama v. White,* 496 U.S. 325 which states "While a tip from an identified or known informant may not be sufficient to support a probable cause finding, such tips are sufficiently reliable to justify an investigatory *Terry* stop." However, our Court does not establish a bright line rule that all accusations made by identified reporters standing alone will establish reasonable suspicion sufficient for a stop. While the court finds greater reliability in tips from concerned citizens who make reports to assist Law Enforcement than the professional informant, the totality of the circumstances must still be reviewed prior to making a reasonable suspicion determination.

"While a tip from an identified or known informant may not be sufficient to support a probable cause finding, such tips are sufficiently reliable to justify an investigatory Terry stop."

Here there were several factors that gave reliability to Dodie McDonald's tip. When she called she not only gave her name but her date of birth. Sergeant McDonald knew where McDonald lived and with whom she lived. The Justices found that McDonald had given sufficient information that she would have incriminated herself if the information turned out to be falsely given. This gave reliability to her tip. McDonald also gave sufficient detail that allowed the police to corroborate her information independently. This included a description of the vehicle, the license plate number, the name of the driver, and the direction in which the truck was heading. The court also noted that an intoxicated driver with children in the car was a threat to public safety .

Given the totality of the circumstances the Court found the tip from Dodie McDonald, an identified informant or concerned citizen, coupled with the corroborative police investigation was sufficient to create reasonable suspicion for an investigatory stop. ❖

Sellmer v. State, 842 N.E.2d 358 (Ind. 2006).
http://www.in.gov/judiciary/opinions/pdf/02160601fsj.pdf

This case involves not only the question of whether an anonymous tip provided reasonable articulable suspicion of criminal activity necessary for a valid Terry Stop, but also a determination of whether Sarah Sellmer was in custody, therefore requiring a Pirtle warning prior to giving consent to search her vehicle.

On November 19, 2001 , dispatchers for the Noblesville Police Department received an anonymous call that a car parked in front of the Supercuts contained Marijuana. The caller described the vehicle and it's location but did not give any information about the driver of the car, the basis for the callers knowledge, any information on the future activities of the driver which would indicate the caller had intimate knowledge of the suspect's activities, or any way for the police to verify the dependability of the information.

Officer Roberts went to the Supercuts and observed a vehicle matching the description parked in front of the building. He observed two women get out and walk into the business. The Officer approached the driver, confirmed she owned the car, and asked her to step

(continued on page 8)

Indiana

outside. Once outside Officer Roberts told Selmer that the police had received information that there were drugs in her car . He asked Sellmer repeatedly if she knew why the police had received that report. The officer then asked Sellmer three to five times for permission to search her car telling her that it would be in her best interest to cooperate and not to make them jump through hoops. At one point Sellmer asked Officer Roberts "Do I have to let you [search my car]?" The officer responded with "it would be in your best interest to cooperate if you have nothing to hide." At another point in the encounter, Sellmer asked him what rights she had and what rights the police had. He responded that it was in her best interest to cooperate.

Where an officer has reasonably articulable suspicion of criminal activity, the officer may stop a person briefly to pursue an investigation. *Terry v. Ohio*, 392 U.S. 1 (1968). To determine whether the officer has reasonable suspicion to make a stop, a reviewing court must look to the totality of the circumstances to assess whether the officer has a 'particularized and objective basis' for suspecting criminal activity. For an anonymous tip to meet this burden, the officer must be able to corroborate the significant aspects of the information; the informant's tip must demonstrate an "intimate familiarity" with the suspect's actions and must give police sufficient information to be able to predict the suspect's future behavior.

The Court determined that the information provided by the anonymous tipster did not meet the requirements to justify the stop. The tip only provided information that any general citizen could gather and lacked information that demonstrated the caller's intimate knowledge of the suspect and her activities. No information was provided that would have allowed Officer Roberts to corroborate the tip or to predict Sellmer's future actions. Based on the anonymous tip, Officer Roberts did not have justification to search Sellmer's car. However, the Court found that merely approaching Sellmer and asking her questions did not violate her constitutional rights.

The Court determined that the information provided by the anonymous tipster did not meet the requirements to justify the stop.

Next, in the review of the search, the Court examined the factors surrounding Sellmer's consent to search. A person who is in custody must be informed of his/her right to consult with counsel prior to giving consent. *Pirtle v. State*, 323 N.E.2d 634 (Ind. 1975). The test for determining whether a person is in custody is whether a reasonable person under the same circumstances would have felt either under arrest or not free to resist the police requests.

Reviewing the conversation between Sellmer and Officer Roberts, the Court concluded that Sellmer was in custody at the time she gave consent and, therefore, required a *Pirtle* advisement. The controlling factors articled by the Court included: 1) the number of times Officer Roberts asked for consent, 2) Officer Roberts' repeated statements that if nothing was found that she would then be allowed to leave, and 3) the fact that Officer Roberts failed to notify Sellmer that she had the right to deny the search or the right to consult with counsel, even after he was specifically asked by Sellmer what her rights were.

The Court concluded in a 3-2 decision that Sellmer's motion to dismiss should have been granted.

Chief Justice Shepard, in a strongly worded dissent, raised concern that the majority misconstrued Officer Roberts' statements and pondered the long-term effect of the majority decision. In his view, the majority had incorrectly viewed the facts from the point that was most unfavorable to the trial court's decision rather than the declared standard of assuming the facts most favorable to the decision. Chief Justice Shepard wrote that in his interpretation, multiple requests for consent were not coercive but further indicated that a search could only occur by consent. He indicated that informing citizens of the nature of the investigation was reasonable and to suggest otherwise might cause police to become more deceptive in their investigations. ❖

2006 Spring Seminar
May 19, 2006
University Place
Indianapolis, Indiana

Recent Decisions Update (continued)

- **SEARCH AND SEIZURE**

Trimble v. State, 842 N.E.2d 798 (Ind. 2006).

http://www.in.gov/judiciary/opinions/pdf/02210601trb.pdf

Trimble was decided by the Indiana Supreme Court in February. The case gives an analysis of how search and seizure is interpreted under the Indiana Constitution as opposed to the Federal Constitution.

At the center of this case is "Butchie" the dog. Butchie was left by his owners in the care of Robert Trimble who owned a farm in Jennings County. Trimble apparently didn't take very good care of Butchie. When the husband of Butchie's owner, Michael Wilcox, visited the farm he saw Butchie chained up to the dog house located behind Trimble's house. Trimble told Wilcox that this was a temporary situation and Butchie would be brought in at night.

On a second trip to the farm, Wilcox again saw Butchie chained to the dog house. This time Butchie looked malnourished, frostbitten, and had an injured leg. Police were called. Sergeant Barger, Jennings County Sheriff's Department, went to the Trimble farm. He pulled into the driveway and walked to the backdoor which appeared to be the most used entrance to the home. On the way from his car to the door he passed the dog house. When no one answered his knock at the door, he walked back towards his car. He stopped at the doghouse and saw a dog inside. He called to Butchie who wouldn't respond. Sergeant Barger then pulled on the chain to remove the dog. Butchie was indeed injured and Barger called animal control who removed the dog. Trimble was charged with cruelty to an animal, abandonment/neglect of an animal and harboring a non-immunized dog.

Trimble moved to suppress the search and seizure of evidence under the Fourth Amendment of the United States Constitution and Article I, Section 11, of the Indiana Constitution. The motion was denied at trial but the appellate court reversed the trial court decision.

In it's review of the Fourth Amendment claim, the Indiana Supreme Court examined Trimble's expectation of privacy in Butchers doghouse. Trimble argued that the doghouse was on his curtilage therefore safe from a warrantless search. The Fourth Amendment protects objects that a person reasonably intended to keep private. It does not protect objects that a person has exposed to the plain view of others. Butchie's doghouse was located on the path between the driveway and the backdoor in a place that was easily observed by anyone who would have pulled into the driveway. The Court determined that this was not an area that was linked to the intimacy of his home, but an area where anyone could have viewed Butchie. They also found that the police had a legitimate investigatory purpose for driving onto Trimble's property and that they only walked in areas that a normal visitor would be expected to travel. The court found Trimble had no legitimate privacy interest in Butchie who was tied up in a place easily observable by the public. Once Sergeant Barger observed Butchie's physical condition, he had probable cause to seize the dog.

The Court next reviewed the claim under the Indiana Constitution. A different analysis is used when looking at searches under the Indiana Constitution. The focus shifts from the defendant's reasonable expectation of privacy to whether the search was reasonable given the totality of the circumstances. The Court used the following factors in determining the reasonableness of the search "1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs." (quoting *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005)).

Sergeant Barger went to Trimble's property because Michael had called the police to complain about Butchie's physical condition. To determine the degree of concern the court used the same reasonable suspicion test used for an investigatory stop case. When the information is from a concerned citizen they looked at whether the citizen had personally witnessed the crime, whether the police corroborated the detail of the citizen's report, whether the citizen identified themselves and whether any doubt could be cast on the citizen's reliability. The reporter in this case identified himself, had been out to the house and reported the condition of Butchie. Barger was able to corroborate Michael's description

(continued on page 10)

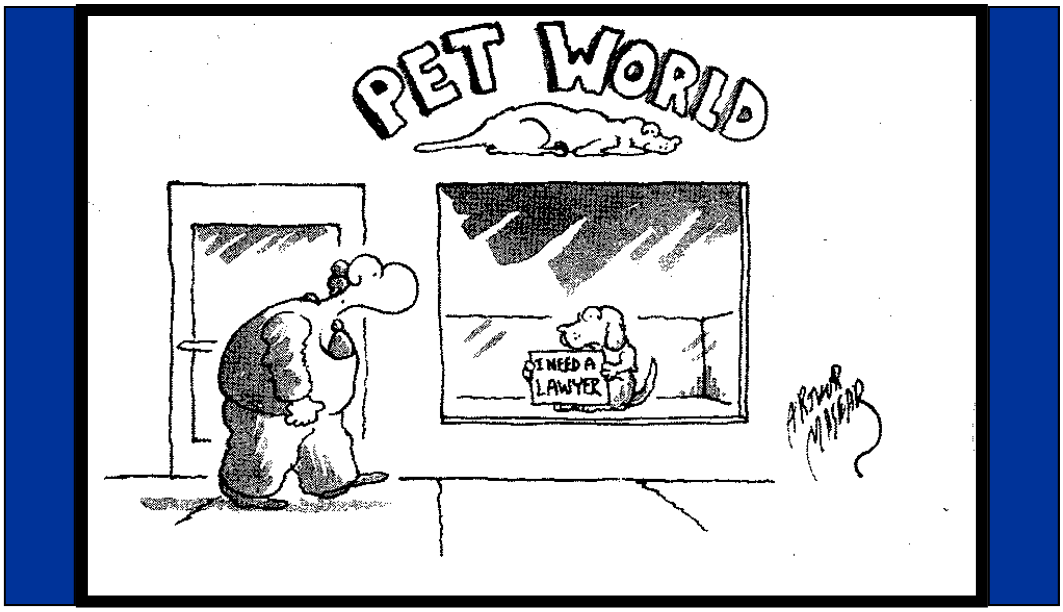
Recent Decisions Update (continued)

of the doghouse and Butchie's appearance. Therefore Barger's concern that a crime may have been committed was reasonable.

In looking at Sergeant Barger's actions the court concluded that his intrusion was minimal. He entered the property through generally accessible routes and didn't stray from normal paths. Butchie was located without intruding into any enclosed or secluded places.

Finally, the court reviewed the extent of law enforcement need to act. Here Barger had received information that an animal's safety was in danger. The Court felt that the need to help Butchie was strong enough to diminish any privacy interest Trimble had.

The Court found that the search and seizure of Butchie was reasonable under the circumstances. They left open the question of whether they would have found the search was justified had it been dependant on entering Trimble's home. But under the facts of this case Barger's actions were reasonable and they overruled the appellate court. ❖



DON'T YOU WISH THEY WERE ALL THIS EASY?
From: The Associated Press—February 6, 2006

Deputy Ed Johnson was in uniform. He was also sitting in a marked patrol car. So he was surprised when a man approached him and allegedly offered to sell him some cocaine.

Michael, Garibay, 34, of Orlando, walked up to Johnson's car at a gas station Friday and asked the Orange County deputy if he was "straight," arrest records say.

When Johnson said that he was, Garibay asked, "Do you know what that means? . . . It means do you want to buy some cocaine." Johnson said "yes," and Garibay pulled out a plastic bag containing several pieces of flat rock substances and asked for cash, records show.

The deputy took the bag and arrested Gairbay after the contents tested positive for cocaine, according to the records.

Garibay was being held in lieu of $7,500 bail on charges of possession of cocaine with intent to distribute, possession of drug paraphernalia and possession of marijuana with intent to distribute. ❖